Filed 5/4/07 Smith v. Hance CA4/1

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | |
|---|---|
| STEVEN L. SMITH,<br><br>Plaintiff, Cross-defendant and Appellant,<br><br>GREGORY SMITH,<br><br>Cross-defendant and Appellant,<br><br>v.<br><br>DANNY G. HANCE,<br><br>Defendant and Respondent. | D047471<br><br>(Super. Ct. No. GIC 847788) |

APPEALS from an order of the Superior Court of San Diego County, Francis M. Devaney, Judge. Affirmed.

Appellants Steven Smith and Gregory Smith appeal from an order issuing an injunction against harassment under Code of Civil Procedure section 527.6[1] in favor of

---

1 All statutory references are to the Code of Civil Procedure unless otherwise indicated. Steven and Gregory Smith are brothers; we refer to them collectively as the

respondent Danny Hance, which in part prohibits the Smiths from "photograph[ing] or videotap[ing] Hance's home, driveway, garage, yard or vehicles." The Smiths contend: (1) section 527.6 does not apply to their actions in photographing Hance's vehicles and surrounding areas because their photograph taking is communicative and thus constitutionally protected; (2) the restraining order is not a reasonable time, place and manner restriction; (3) their photograph-taking activities are protected by the Civil Code section 47 litigation privilege as preparatory to constitutionally protected petition activity; (4) there is insufficient evidence of a "course of conduct" as to Steven Smith because there is no evidence he acted in concert with Gregory Smith; and (5) the trial court erred in denying Gregory's Smith's request to strike Hance's petition under Code of Civil Procedure section 425.16, commonly known as the "anti-SLAPP" (strategic lawsuit against public participation) statute. We reject these contentions and affirm the order.

## FACTUAL AND PROCEDURAL BACKGROUND

Danny Hance and his family live on Ivy Street in the City of San Diego, several houses down the street from Steven and around the corner from Gregory. Hance and the Smiths, as well as another neighbor, Gilda Mullette, who lives directly across the street from Hance, have been involved in long standing disputes over various matters, including the Smiths' complaints that Hance conducted commercial operations in their residential neighborhood, resulting in various temporary restraining order (TRO) and administrative

---

Smiths or separately by their first names not out of disrespect, but for purposes of clarity. They have each adopted and incorporated by reference the arguments made in their respective appellate briefs.

proceedings as well as two civil lawsuits. Hance brought one of the lawsuits in October 2002 on behalf of himself, his wife Jennifer Hance and Hance's company Hance Demolition, Inc., alleging that Mullette, and in some instances Steven, harassed the Hances by surveilling and photographing them, their vehicles and children, and making unfounded and/or defamatory complaints or reports to police, City of San Diego (the City) Neighborhood Code Compliance Department representatives, the Hances' landlord, and Child Protective Services.

In July 2002, after submitting their claims to mediation, Mullette, Steven and the Hances entered into a Memorandum of Understanding (MOU) in which Mullette and Steven were required to pay $18,500 to the Hances and the parties agreed to submit future claimed or alleged municipal code violations to JAMS, a arbitration services organization. In November 2003, the Hances were required to obtain a court order enforcing the MOU's performance.

In January 2004, the Smiths resumed their photograph taking and, over the course of the next year, made additional complaints about Hance to the City. In February 2005, after the Hances voluntarily complied with the City's requests concerning their business operations, the City notified Jennifer Hance that further action by the Neighborhood Code Compliance Department was not warranted, and they would be "closing the case" with regard to the Hances' Ivy Street residence.

In April 2005, Gregory filed some form of civil complaint against Hance. On May 18, 2005, the Neighborhood Code Compliance Department advised the Hances, Mullette and the Smiths by letter that it had continued to receive communications pertaining to

their dispute, reminded them of their settlement agreement to arbitrate future claims with JAMS, and offered them $750 toward the cost of returning the matter to JAMS. The City representative noted that Gregory, while not a party to the earlier settlement, was willing to participate in the arbitration. The letter stated: "This arbitration would be wholly administered by JAMS, and the City of San Diego would not be taking part in this process or in any subsequent attempts to mediate." It concluded: "Please be advised that the City of San Diego has spent dozens of staff hours trying to resolve this long-standing conflict to everyone's satisfaction. It has been a drain of very limited City resources. We believe it is incumbent upon you to resolve this matter without additional taxpayer expense."

On May 20, 2005, Steven filed a Judicial Council form request for an order to stop harassment claiming Hance followed him home and threatened him on several occasions in January, February and May of 2005 (*Steven Smith v. Danny Hance* (Super. Ct. San Diego County, No. GIC847788)). Hance answered and filed a "cross" request against both Steven and Gregory. In it, he alleged that "for 6 years [Steven] and [Gregory] have photographed my home and family from their vehicles, bicycle and on foot. Their continuous actions at our home has [*sic*] made me and my family uncomfortable in our own home and yard. My children are continually alarmed by 'the men who take pictures

of them.' " Hance obtained a temporary restraining order against the Smiths pending a court hearing.[2]

The matter proceeded to trial on the Smiths' and Hance's respective requests.[3] Hance's wife, Jennifer Hance, testified that on January 10, 2004, two days after she had received the settlement check from Mullette and Steven under their MOU, she saw Gregory taking pictures in front of her house. Over the next year, she saw both Gregory and Steven taking photographs in front of their house at least a dozen times each. She and other neighbors were concerned about the Smiths' photograph taking; Jennifer Hance testified that having to deal with code compliance representatives and attorneys reduced her time with her children, and the resulting stress had impacted her health. Breaking into tears, Jennifer Hance described why she became upset: "They're always watching us. They watch us all the time. Every time they go by they drive by about two miles an hour. My children come running in, Mom, Mom, the men are taking pictures, just took pictures." Jennifer Hance testified she saw instances of coordinated effort by Mullette

---

2 The record shows that on June 3, 2005, the court ordered the parties to return to JAMS, and both Steven and Hance thereafter filed arbitration demands with JAMS. Because Gregory had not filed a demand, Hance returned to superior court and obtained another order referring the parties, including Gregory, to JAMS. After Gregory advised JAMS he could not afford the fee, Hance appeared ex parte and obtained an order compelling arbitration. Hance also obtained a tentative order in Gregory's lawsuit (*Gregory Smith v. Hance et al.*, (Super. Ct. San Diego County, No. GIC845889)) to compel arbitration of that action. Despite Hance's efforts, the arbitration was taken off calendar for Gregory's nonpayment of fees, and thereafter the court set the *Smith v. Hance* request and the *Hance v. Smith* cross-request for trial on August 26, 2005.

3 Steven does not appeal from the trial court's denial of his restraining order request. We thus limit our review of the evidence to that presented on Hance's cross-request.

and the Smiths; Mullette would spot their truck in front of their house while her husband stopped for lunch and within minutes the Smiths would appear with their cameras ready to take pictures. Based on her review of the neighborhood code compliance file containing numerous e-mails and hundreds of photographs, Jennifer Hance's overall impression was that she and her family were under "constant surveillance." She testified that Steven and Gregory had surveyed her home and taken photographs "countless" and "dozens" of times respectively.

Hance testified that between January 2004 and January 2005, he had observed Steven taking photographs about five or six times, and Gregory taking photographs about 20 to 40 times. However, based on the photographs he saw in connection with the trial, Hance believed Gregory had clearly taken pictures on many more occasions than he had observed. Hance also saw what he believed was coordinated activity in that Gregory would arrive to take pictures a few minutes after Steve appeared and took pictures. Hance testified he broke his front teeth as result of the stress he suffered from the Smiths' activities. According to Hance, the Smiths drove by his house virtually every day, and although the Hances sought to log the incidents of the Smiths activities, they could not record every single one of them. Hance could not count how many times the Smiths had each driven slowly by his house.

Arna Lee Morris testified that she had seen Gregory at least three times in the past year slowly drive past Hance's home, peer up the driveway, and take pictures of the front of the house and driveway. According to Morris, on February 23, 2005, she saw Gregory appear and take photographs about five or ten minutes after Steven had been in front of

Hance's house taking photographs. She had seen Steven drive by Hance's home and take pictures about six "or so" times in the past year, including while he was on a bicycle on one occasion late in the evening.

Steven testified in his defense on Hance's request. He explained that at meetings with the City officials in approximately March 2004 and August 2004, he was "instructed . . . that if certain situations occurred in my neighborhood, that the code enforcement would have me take a photo and submit a written complaint." The appearance of Hance's Ford F550 truck in March 2004 prompted him to go to code enforcement officials who told him it would violate regulations. Steven pointed out that he had not taken pictures of Jennifer Hance or her children, and that any pictures of Danny Hance were related to the vehicles.

Gregory also admitted to taking photographs, almost 100 in a four-month period of time, and possibly 500 since January of 2004, stating the City had asked him to submit them as documentation of his complaints. He testified he traveled in front of Hance's home "six, ten times a day" because it was his only ingress and egress, and that he took photographs during those times: "When I happen to spot something that happens to be a Municipal Code violation of the kind that is separate from the kind of residential violation, which happens to be of the kind – of the quality of public nuisance, I snap a photo. I may or may not submit the photos all at once. In other words; I take photos and I don't submit them. But I generally have a pile of photos." Gregory acknowledged that in June 2004, the Hances voluntarily agreed to comply with the City requests to move their business operations from their residence, but he claimed he later observed more

violations and made additional complaints to the City in March and April of 2005. He stated that at that point, the City "balk[ed] at doing their administrative duty" about the matter. Gregory testified he then sued Hance "for violence" in April 2005, involving "similar incidents that my brother experienced." He also confirmed that since issuance of the TRO in the present matter, the City had not called him asking for photographs; he acknowledged that City representatives "don't ever want to hear from me again." When asked by Steven's counsel, Gregory testified he took his photographs "specifically" in preparation for his lawsuit, which he stated was for public and private nuisance based on his claim that Hance was operating a business in their neighborhood in violation of the municipal code.

The court denied Steven's request for an order under section 527.6 for insufficient evidence that Hance posed a threat of imminent irreparable harm to Smith. However, it granted Hance's request, issuing a three-year protective order against the Smiths in favor of Hance and his family. Observing Gregory had admitted taking hundreds or possibly thousands of pictures, the court ruled his behavior was annoying and harassing to the Hances, that it caused them emotional distress, and that the picture taking no longer had any legitimate purpose of providing information to the City.[4] The court distinguished,

---

[4] On this point, the court reasoned: "At one point you told me that you're assuming the civic duty. Apparently the City had told you that is enough, then you stepped into their shoes is my read of what you said. But if that is your purpose it is a legitimate purpose, but it's got to a point of being illegitimate. You have been told by the City we have enough information. You've been told by the City we have enough. We don't need more information. The City has very, very clearly told all of you we don't want anymore to do with your dispute. Go to JAMS. In fact, we have an agreement with JAMS. Leave

however, between the Smiths' right to petition the City or government for redress and their picture taking: "So the question is, is your picture taking for the stated purpose of assisting the City in its case or in the case you would like the City to pursue against Danny Hance, is that protected . . . constitutional activity? And I find that it's not. The protected activity is petitioning the government for redress. That is what the words are in the constitution. And you may petition your government for redress. But you don't need to take pictures. And you take thousands of pictures. Pictures that are repeated dozens and dozens of times. As I paged through them last night I started not being able to tell one thing from the other. Taking pictures is not a constitutional right. I think we all agree I don't think they had cameras when the constitution was written. If you really want to get technical taking pictures is not a constitutional right. Petitioning the government is a constitutional right." The court further stated it was "not going to restrict you from contacting the City [or]. . . anyone else about your continuing problems with the way Mr. Hance – whether he operates a business or not at his home. And whether he has [an] overweighted commercial vehicle on a residential street. I'm not going to order you to desist doing that. That is your right. But I'm going to order you to stop taking pictures of their residence and their trucks."

In addition to the standard provisions barring the Smiths from harassing, attacking, striking threatening, assaulting, hitting, following, or stalking the Hances, the court

---

us out. We'll give you money to go to JAMS out of the City's share, is what they're telling you. So I think your previously legitimate reasons is now illegitimate. It's no longer legitimate."

ordered that the Smiths were barred from photographing or videotaping the Hances' home and their driveway, garage, yard and the vehicles parked in front of their home. The Smiths separately appeal from the order.

## DISCUSSION

### I. *The Provision against Photographing or Videotaping Does Not Enjoin Constitutionally Protected Conduct*

In a series of arguments, the Smiths challenge the trial court's application of section 527.6 to their acts in photographing Hance's property. They argue their right to petition the government – namely, contacting city officials concerning the Hances' asserted code violations in conducting commercial operations in a residential area – is specifically excluded from the statute as constitutionally protected activity. They further argue the photographs, which were taken on public streets of assertedly non-private matters for purposes of communicating to municipal authorities, are communicative conduct protected by the First Amendment. Finally, relying upon *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, the Smiths argue the court's order is not a reasonable time, place and manner restriction.

#### A. *Standard of Review*

We begin with the proper standard of review. Hance contends we should give deference to the trial court's factual findings supporting the injunction. The Smiths argue that where protected speech activities are implicated or the matter presents a legal issue, we must review the matter de novo.

In *Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762, the court addressed a substantial evidence challenge to a civil harassment order under section 527.6: "In assessing whether substantial evidence supports the requisite elements of willful harassment, as defined in . . . section 527.6, we review the evidence before the trial court in accordance with the customary rules of appellate review. We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge in all legitimate and reasonable inferences to uphold the finding of the trial court if it is supported by substantial evidence which is reasonable, credible and of solid value."

Here we are faced with the Smiths' claim that the injunction infringes upon their First Amendment rights by prohibiting their picture taking. In *In re George T.* (2004) 33 Cal.4th 620 (*George T.*), the California Supreme Court held that a minor's "plausible First Amendment defense" required it to conduct an independent examination of the record to decide whether the minor's poem was constitutionally protected expressive speech, or a criminal threat under Penal Code section 422. (*George T.* at p. 632.) In reaching its conclusion, it observed the United States Supreme Court has repeatedly engaged in independent review in various First Amendment contexts, including non-criminal matters, doing so "without reference to the unique nature of the specific First Amendment question involved." (*Id.* at p. 632.) Such review is necessary " 'because the reaches of the First Amendment are ultimately defined by facts it is held to embrace' and an appellate court must decide 'whether a given course of conduct falls on the near or far side of the line of constitutional protection.' " (*Ibid*., quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) 515 U.S. 557, 567.)

The *George T.* court explained further that "[i]ndependent review is not the equivalent of de novo review 'in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes' the outcome should have been different. [Citation.] Because the trier of fact is in a superior position to observe the demeanor of witnesses, credibility determinations are not subject to independent review, nor are findings of fact that are not relevant to the First Amendment issue. [Citation.] . . . [U]nder the substantial evidence standard, the question is whether any rational trier of fact could find the legal elements satisfied beyond a reasonable doubt, whereas under independent review, an appellate court exercises its independent judgment to determine whether the facts satisfy the rule of law. Accordingly, we will defer to the [trial] court's credibility determinations, but will ' " 'make an independent examination of the whole record' " ' [citation], including a review of the constitutionally relevant facts ' "de novo, independently of any previous determinations by the [juvenile court]" ' [citations] to determine whether minor's poem was a criminal threat entitled to no First Amendment protection." (*George T.*, *supra*, 33 Cal.4th at p. 634.) The *George T.* court applied these principals when presented with a First Amendment challenge to a preliminary injunction in *DVD Copy Control Assn. v. Bunner* (2003) 31 Cal.4th 864, 889-890 (*DVD Copy Control*). (*George T.*, at p. 634.)

Since the Smiths raise a "plausible First Amendment defense" (*George T.*, *supra*, 33 Cal.4th at p. 632), we apply the independent review standards set out in *George T.* and *DVD Copy Control* to the question of whether their conduct constitutes civil harassment under section 527.6 or whether it is protected by the First Amendment. This requires us

to independently examine the record and determine whether the evidence in the record supports the factual findings necessary to establish that the injunction was warranted (*DVD Copy Control*, *supra*, 31 Cal.4th at p. 890) so as to "ensure that the [Smiths'] free speech rights have not been infringed by the trier of fact's determination that the communication at issue constitutes [civil harassment]." (*George T.*, *supra*, 33 Cal.4th at p. 632.)

B. *The Smiths' Photograph Taking Satisfies the Elements of the Civil Harassment Statute*

Section 527.6, subdivision (d) provides that a court shall issue an injunction prohibiting harassment if it "finds by clear and convincing evidence that unlawful harassment exists." Harassment is defined as "a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff." (§ 527.6 , subd. (b).) On a showing of good cause, the injunction may include other family members who reside with the plaintiff. (§ 527.6 , subd. (c).) The statute defines "course of conduct" as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an individual, making harassing telephone calls to an individual, or sending harassing correspondence to an individual by any means, including, but not limited to, the use of public or private mails, interoffice mail, fax, or computer e-mail." The statute further provides, "Constitutionally protected activity is not included within the meaning of 'course of conduct.' " (§ 527.6,

subd. (b)(3).) "Section 527.6 was enacted 'to protect the individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution.' [Citations.] It does so by providing expedited injunctive relief to victims of harassment." (*Brekke v. Wills* (2005) 125 Cal.App.4th 1400, 1412; see also *Schraer v. Berkeley Property Owners' Assn.* (1989) 207 Cal.App.3d 719, 729-730.)

Importantly, with the exception of the "course of conduct" element as to Steven, which we discuss below, the Smiths do not meaningfully challenge the sufficiency of the evidence of the trial court's underlying factual findings as to the repeated and persistent nature of their photograph taking of the Hance property, its knowing and willful nature, or the Hances' resulting emotional distress.[5] While Steven asserts in his reply brief that "at no time did the trial judge find that the photo taking was not to document complaints," this ignores the court's express finding that the conduct had lost any legitimate purpose due to the vast number of photographs taken on a repeated basis. Our role on appeal is to uphold the trial court's credibility findings, and view the background factual findings in favor of the trial court's order as long as they are supported by substantial evidence. Here, by February 2005, the City had "closed its case" on matters involving the Hance

---

[5] Without engaging in a proper substantial evidence analysis and without citing supporting authority, Gregory asserts the record shows "not a scintilla of substantial evidence" that his actions caused the Hances' injuries. However, both Jennifer and Danny Hance provided direct evidence of emotional distress sufficient to warrant an injunction under section 527.6, and the court could also reasonably infer that a reasonable person would suffer such emotional distress from the nature of the Smiths' repeated and persistent photograph taking. (See e.g., *Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1110-1111.)

residence, and by May 2005, it expressly refused to consider any further complaints involving the Smiths and Mullette, referring them to JAMS. Gregory himself conceded the City declined to consider his further complaints about the Hances as of March and April 2005; that it did not want to hear from him again. We have little difficulty concluding that substantial evidence supports the trial court's underlying factual findings as to the elements of civil harassment, including those relating to the absence of any legitimate purpose to the Smiths' photograph taking after February 2005. Nor do we have any difficulty independently concluding on this evidence that for purposes of assessing the legitimate purpose element, no justification existed for the Smiths' *future* conduct in taking photographs after the City had concluded its review of the matter.

As for the required course of conduct, the Smiths contend that as to Steven, there is insufficient evidence of a "course of conduct" within the meaning of section 527.6. Specifically, they maintain the evidence shows only that Steven took 35 photographs on 15 occasions,[6] and that Gregory's conduct cannot be imputed to Steven on a concerted conduct theory because there is no evidence they had a mutual understanding to act together. The Smiths do not challenge the court's course of conduct finding as to Gregory.

A series of acts over a period of time, however short, evidences a continuity of purpose sufficient to constitute a course of conduct under section 527.6. (*Leydon v.*

---

6 On the next page of his brief, Steven asserts he took 35 photographs on 11 different occasions. The discrepancy does not change our conclusion about the sufficiency of the evidence as to Steven's course of conduct.

*Alexander* (1989) 212 Cal.App.3d 1, 4.) Based on the trial testimony of both Hances that they witnessed Steven taking photographs directed at the front of their property "dozens" and "countless" times over the course of 2004, we conclude Steven's actions by themselves show a continuity of purpose and meet the requisite course of conduct within the meaning of section 527.6. (See *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 134 [testimony of a single witness, including that of a party, may be sufficient to establish substantial evidence].)

C. *Photographing as Constitutionally Protected Activity*

The Smiths primary challenge is to the application of section 527.6 to what they assert is their right under the federal and California Constitutions to petition the government and take photographs in furtherance of their complaints to the City and in connection with pending litigation.[7] The general proposition first advanced by the Smiths – that section 527.6 does not apply to constitutionally protected activity – is without controversy. The statute itself excludes constitutionally protected activity as "course of conduct" within the meaning of the statute. (§ 527.6, subdivision (b); *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 652; *Smith v. Silvey* (1983) 149 Cal.App.3d

---

[7] The First Amendment to the United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech . . . ." This fundamental right is applicable to the states through the due process clause of the Fourteenth Amendment. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 133-134 (*Aguilar*), citing *Gitlow v. People of New York* (1925) 268 U.S. 652, 666.) Article I, section 2, subdivision (a) of the California Constitution provides broader protection: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (See *Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1241.)

400, 405.) However, section 527.6 does not provide examples of constitutionally protected activity.[8]

Of course, the right to petition for redress of grievances is a " 'fundamental' " first amendment right. (*Smith v. Silvey*, *supra*, 149 Cal.App.3d at p. 406.) However, unlike the injunction preventing the appellant from initiating complaints with public agencies in *Smith v. Silvey*, the court's injunctive order in this case does not prevent the Smiths from communicating orally or in writing with the City or any other government entity, nor does it bar them from filing complaints or exercising any other petitioning activity in those forms. Indeed, the trial court was careful to craft the injunction to preserve the Smiths' right to petition the government. Nor are such communications or petitioning activities unreasonably curtailed by the court's order enjoining the Smiths from taking photographs because for purposes of any future complaints the Smiths can provide an

---

8 Florida's stalking statute, for example, provides: "Constitutionally protected activity is not included within the meaning of 'course of conduct.' Such constitutionally protected activity includes picketing or other organized protests." (Fla. Stat. § 784.048, subd. (1)(b); *Goosen v. Walker* (Fla.Dist.Ct.App. 1998) 714 So.2d 1149, 1149-1150.) Indiana's stalking and harassment statutes provide that "[h]arassment does not include statutorily or constitutionally protected activity, such as lawful picketing pursuant to labor disputes or lawful employer-related activities pursuant to labor disputes." (Ind. Code, § 35-45-10-2; *Waldon v. State* (Ind.App. 1997) 684 N.E.2d 206, 210, fn. 2.) The District of Columbia's stalking statute provides that "[c]onstitutionally protected activity, such as conduct by a party to a labor dispute in furtherance of labor or management objectives in that dispute, is not included within the meaning of [the definition of stalking].) (D.C. Code, § 22-404, subd. (b).)

oral or written description of any observations they make to the City.[9]

Nevertheless, analogizing their photographs to something akin to the work of Ansel Adams or other depictions such as cartoons or paintings, the Smiths contend their photograph taking is communicative and thus deserving of constitutional protection; that even the "dry information contained" within them is accorded First Amendment protection under *DVD Copy Control*, *supra*, 31 Cal.4th 864. Citing *Tunick v. Safir* (2nd Cir. 2000) 228 F.3d 135, a wholly distinguishable case involving a photographer's artistic

---

[9] In this way, the injunction in this case is also unlike that presented in recently decided *Balboa Island Village Inn v. Lemen* (2007) ___ Cal.4th ___ [2007 DAR 5805] (April 26, 2007). In *Balboa Island*, the California Supreme Court upheld an injunction against speech judicially determined to be defamatory, ruling such an injunction is not an unconstitutional prior restraint per se and does not offend the First Amendment. (*Balboa Island*, ___ Cal.4th at p. ___ [2006 DAR at pp. 5806, 5808-5809].) However, the court ruled the injunction at issue was overly broad because it applied not just to the defendant Lemen, but to her " 'agents, all persons acting on her behalf or purporting to act on her behalf and all persons in active concert and participation with her,' " even though there was no evidence to support a finding that anyone other than Leman had defamed the plaintiff. (*Balboa Island*, 2007 DAR at p. 5812.) Further, the court held the injunction, which prevented Lemen from making defamatory statements to " 'third persons,' " could not prevent Lemen from presenting her grievances to the government and thus modified it to prevent her from making such statements to third persons " 'other than government officials with relevant enforcement responsibilities.' " (*Ibid*.) The injunction here does not suffer from the defects present in *Balboa Island*.

Although *Balboa Island* involves an injunction against defamatory statements and therefore does not squarely address the circumstances presented here with regard to picture taking, it generally supports our conclusion *post* that the Smiths' nonexpressive photograph taking, found by the trial court to violate section 527.6, is not constitutionally protected, and the injunction in this case prohibiting that conduct does not violate the First Amendment. (See *Balboa Island*, *supra*, ___ Cal.4th at pp. ____ [2007 DAR at pp. 5808-5809 [summarizing cases in which the "high court held an injunctive order prohibiting the repetition of expression that had been judicially determined to be unlawful did not constitute a prohibited prior restraint of speech"].)

exhibition of 75 to 100 nude models for a photo shoot, they rely on the general proposition that photographs taken in public areas are given First Amendment protection.

These general arguments are misplaced. Even assuming the Smiths' photographs can be characterized as an expressive activity, it is settled that not all speech or petition activity is constitutionally protected. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 313; *Aguilar*, *supra*, 21 Cal.4th at p. 134 ["the right to free speech is not absolute"], citing *Near v. Minnesota* (1931) 283 U.S. 697, 708 and *Stromberg v. California* (1931) 283 U.S. 359; *People v. Borrelli* (2000) 77 Cal.App.4th 703, 713-714.) In upholding an injunction against racial epithets that amounted to employment discrimination, the court in *Aguilar* pointed out that civil wrongs may consist solely of spoken words such as slander and intentional infliction of emotional distress, and that a "statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity." (*Aguilar*, at p. 141, citing *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 628 ["[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent – wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection"].) Recognizing that " '[s]peech may be enjoined where a fair judicial process has determined that a repetitive pattern of speech is unprotected,' " (*Aguilar*, at p. 142), the California Supreme Court in

*Aguilar* held the injunction in that case was not a prior restraint under the California and federal Constitutions "because defendants simply were enjoined from continuing a course of repetitive speech that had been judicially determined to constitute unlawful harassment in violation of the [Fair Employment and Housing Act]." (*Aguilar*, at pp. 144-145.)

These principles apply to conduct violating the civil harassment statute. This court so recognized in *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1250: "In California, speech that constitutes 'harassment' within the meaning of section 527.6 is not constitutionally protected, and the victim of the harassment may obtain injunctive relief." The right to free speech "does not include the right to repeatedly invade another person's constitutional rights of privacy and the pursuit of happiness through the use of acts and threats that evidence a pattern of harassment designed to inflict substantial emotional distress." (*People v. Borrelli, supra,* 77 Cal.App.4th at p. 716 [addressing substantially identical statute, Penal Code section 646.9, prohibiting stalking].)

Further, the court's injunction was not targeting the "message" of the Smiths' photographs (if any) insomuch as the manner in which they were taken. Thus, the restriction imposed by the trial court was content neutral in that it generally related to the location and frequency in which the Smiths' photographing was taking place (in the area of the Hance's home), not to whatever message the Smiths' photographs were intended to communicate. "[L]iteral or absolute content neutrality" is not necessary; a restriction is content neutral if it is " 'justified without reference to the content of the regulated

speech.' " (*Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 368, italics omitted.) The challenged provision of the injunction thus does not constitute a traditional prior restraint that would be subject to elevated constitutional scrutiny, although general First Amendment principals still apply. (See *DVD Copy Control, supra,* 31 Cal.4th at p. 877; *Madsen v. Women's Health Ctr., Inc.* (1994) 512 U.S. 753, 763, fn. 2 (*Madsen*).) When evaluating the constitutionality of a content-neutral injunction the court must determine " 'whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.' " (*DVD Copy Control*, at p. 880; *Madsen*, 512 U.S. at 765.) "This test requires 'a balance between the governmental interest and the magnitude of the speech restriction.' " (*DVD Copy Control*, at p. 880.)[10]

The trial court's restriction, which as stated was limited to photographing and videotaping and did not include actual petitioning activities, was properly issued under California's civil harassment law and undoubtedly serves significant government interests; the legislature's stated intent in enacting section 527.6 was to "protect the individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution." (Stats. 1978, ch. 1307, § 1; Historical and Statutory Notes, 15A West's

---

10 Even if we were to apply the "time, place and manner" analysis as requested by the Smiths, we would still uphold the trial court's injunction which was limited to photographing and videotaping. A reasonable time, place, and manner regulation on speech will be upheld if it is (1) narrowly tailored, (2) serves a significant government interest, and (3) leaves open ample alternative avenues of communication. (*Los Angeles Alliance for Survival v. City of Los Angeles, supra,* 22 Cal.4th at pp. 367-368.)

Ann. Code Civ. Proc. (1979 ed.) foll. § 527.6, p. 230.) The prevention of harassment is an important governmental objective, particularly when it involves activities surrounding a residence. " 'The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.' " (*Frisby v. Schultz* (1988) 487 U.S. 474, 484; *Carey v. Brown* (1980) 447 U.S. 455, 471.)

In this vein, we reject the Smiths' argument that Hance had no objectively reasonable expectation of privacy in connection with photographs of their vehicles taken from the vantage of a public street. The evidence showed that the Smiths' took photographs at all hours of the day and evening encompassing the Hances' home, front and back yard, as well as Hance's workplace.[11] The California Supreme Court has explained that "privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law. Although the intrusion tort is often defined in terms of 'seclusion' [citations], the seclusion referred to need not be absolute. 'Like "privacy," the concept of "seclusion" is relative. The mere fact that a person can be seen by someone does not automatically mean that he or she can

---

11 The trial court observed: "You're taking pictures in the day time. You're taking pictures at sunup. You're taking pictures at sunset. You're taking pictures of the street. You're taking pictures of the driveway. I have pictures of the backyard out to the garage in the back. I've got pictures of various workplaces. I've got pictures of trucks. I've got pictures of trailers. I mean, its incredible how many pictures you take." As we have stated, the Smiths do not challenge these findings.

be legally forced to be subject to being seen by everyone.' " (*Sanders v. American Broadcasting Companies, Inc.* (1999) 20 Cal.4th 907, 915-916.) Thus, an expectation of privacy for purposes of the intrusion tort need not be absolute or complete. (*Id*. at p. 915.)

For the intrusion tort, California has adopted the formulation set forth in section 652B of the Restatement Second of Torts. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 724.) While photographing a person in a public place is not generally an invasion of privacy under the Restatement (Rest.2d Torts, §652B, com. c., p. 379; *Wolfson v. Lewis* (E.D. Pa. 1996) 924 F.Supp. 1413; *Wehling v. Columbia Broadcasting System* (5th Cir. 1983) 721 F.2d 506, 509), the drafters nevertheless recognized that conduct repeated with such persistence and frequency as to amount to a "course of hounding the plaintiff, that becomes a substantial burden to his existence" may constitute an invasion of privacy. (Rest.2d Torts, § 652B, com. d., p. 380.) On this theory, other courts have upheld prohibitions against photographing and videotaping. (*Goosen v. Walker, supra*, 714 So.2d at p. 1149-1150 [upholding injunction preventing the defendant from photographing or videotaping his neighbors against First Amendment challenge; evidence showed defendant had videotaped them on two to four occasions during four months when they were in their own yard and adjoining area]; *Wolfson v. Lewis*, *supra*, at p. 1420 ["Conduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may nevertheless rise to the level of invasion of privacy based on intrusion upon seclusion"].)

In sum, the provision of the injunction barring photographing and videotaping Hance's home, driveway, garage, yard or vehicles does not infringe on the Smiths' freedom of speech rights under the federal or California Constitutions.

II. *Litigation Privilege*

The Smiths contend their actions in complaining to governmental entities, including their photograph taking, is protected by the Civil Code section 47, subdivision (b) litigation privilege (hereafter the 47(b) privilege). In particular, they maintain the photograph taking activities are protected under the doctrine as "preparatory" to petitioning activities.

Civil Code Section 47 states in part: "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 2 of Part 3 of the Code of Civil Procedure . . . ." Recently, the court in *Rusheen v. Cohen* (2006) 37 Cal.4th 1048 (*Rusheen*) explained: " 'Although originally enacted with reference to defamation [citation], the privilege is now held applicable to any communication, whether or not it amounts to a publication [citations], and all torts except malicious prosecution. [Citations.] Further, it applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved. [Citations.] [¶] The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial

proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]' [Citation.] Thus, 'communications with "some relation" to judicial proceedings' are 'absolutely immune from tort liability' by the litigation privilege [citation]. It is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. [Citation.] [¶] Because the litigation privilege protects only publications and communications, a 'threshold issue in determining the applicability' of the privilege is whether the defendant's conduct was communicative or noncommunicative. [Citation.] The distinction between communicative and noncommunicative conduct hinges on the gravamen of the action. [Citations.] That is, the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature." (*Rusheen*, *supra*, 37 Cal.4th at p. 1057.)

Preliminarily, we observe this case is not one in which a party seeks protection via the litigation privilege to activities that have themselves been made the subject of litigation. In his request under section 527.6, Hance did not seek to impose tort or any other type of liability for the Smith's past actions, he sought only to enjoin *future* acts of photograph taking and other specified conduct by the Smiths found by the court to have no legitimate purpose and thus constitute harassment within the meaning of section 527.6. (See *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, *supra*, 129 Cal.App.4th at pp. 1265-1266 [injunctive relief under section 527.6 lies only to prevent threatened injury, has no application to wrongs that have been completed,

and should not serve as punishment for past acts].) The California Supreme Court in *Flatley v. Mauro* emphasized that "Civil Code section 47 states a statutory privilege not a constitutional protection," and the privilege is "specific and limited in nature." (*Flatley v. Mauro*, 39 Cal.4th at pp. 324-325.) We are not convinced that the principal purpose of the litigation privilege – to afford litigants and witnesses the "utmost freedom of access to courts without fear of being harassed subsequently by derivative tort actions" (*Flatley v. Mauro*, at p. 321) – is implicated in Hance's request to enjoin the Smiths' future conduct under section 527.6.

We need not resolve that question, however, because were we to apply *Rusheen*'s analysis to the conduct Hance sought to prevent, we would easily conclude that the Smiths did not meet their burden to establish the elements necessary to obtain the protection of the 47(b) privilege. (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 37.) The gravamen of Hance's proceeding under section 527.6, and the trial court's injunction, was to prevent essentially noncommunicative conduct, that is, the Smiths' surveillance and repeated appearances in front of the Hance residence to take numerous photographs of their vehicles, home, garage, yard, and driveway. (Accord *Kimmel v. Goland* (1990) 51 Cal.3d 202, 205 [rejecting immunity under Civil Code section 47, subdivision (b) for illegal recording of confidential telephone conversations];

*Susan S. v. Israels* (1997) 55 Cal.App.4th 1290, 1300.)[12]

The Smiths did not establish that the prohibited photograph taking would further the object of any litigation or other official proceeding. " 'The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action.' [Citation.] '[ T]he communication must have an objective relationship to the litigation. [¶] "A document is not privileged merely because it has been filed with a court or in an action. The privileged status of a particular statement [or communicative act] therein depends on its relationship to an actual or potential issue in an underlying action." ' " (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 346.) Here, the City had closed its case and declined

---

12 We note that, while this case was pending oral argument, the California Supreme Court decided *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948. There, the court addressed whether the Civil Code section 47(b) litigation privilege protected a letter written by a victim witness program supervisor in connection with a family law proceeding against an invasion of privacy cause of action, and more generally whether the privilege protected against a cause of action based on California's constitutional right to privacy. The court concluded both were protected. (*Jacob B.*, at p. 960.) In reaching its decision, *Jacob B.* addressed the threshold issue of communicative versus noncommunicative conduct. Citing *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1065, the court pointed out " 'if the gravamen of the action is communicative, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct . . . . Stated another way, unless it is demonstrated that an independent, noncommunicative, wrongful act was the gravamen of the action, the litigation privilege applies.' " (*Jacob B.*, at p. 957.) Here, even if we assume the litigation privilege could protect conduct that is the subject of a section 527.6 request, the "cause of action" is Hance's request for a civil harassment injunction, the "gravamen" of which is based on the Smiths' incessant photograph taking. *Jacob B.* does not change our holding.

to consider the Smiths' complaints as to Hance. Accordingly, the conduct at issue in the section 527.6 proceeding — the Smiths' future picture-taking — could have no relation to any official proceeding.

While the Smiths point to Gregory's testimony at trial that he took his photographs specifically in preparation for his civil nuisance lawsuit, Gregory also testified that his April 2005 lawsuit against Hance involved Hance's "violence" against him, acts or threats by Hance similar to what Steven had assertedly experienced. There is no pleading or other evidence in the record that is properly the subject of judicial notice establishing the nature of Gregory's April 2005 lawsuit. The trial court could thus have rejected Gregory's testimony concerning the public nuisance character of his action. But even if we give credit to Gregory's bare assertion at trial, it simply does not establish that his picture taking was performed to achieve the objects of his litigation or had some logical relation to his action. That a communication may concern the subject matter of the litigation is not sufficient to establish a "logical relation" to invoke the privilege. (*Rothman v. Jackson* (1996) 49 Cal.App.4th 1134, 1145.)

III. *Gregory's "Motion" Under Section 425.16*

On August 9, 2005, 17 days before the start of trial on the matters, Gregory filed a memorandum of points and authorities in support of what he characterized as a special motion to strike and dismiss Hance's "retaliatory and improper Cross-Complaint" under section 425.16. The paper identified a "hearing date" of August 9, 2005, the same day the paper was filed. Gregory argued Hance's petition for injunctive relief aimed only to punish Gregory for his civil action against Hance, filed in April 2005, assertedly for

public and private nuisance, assault and infliction of emotional distress, and also sought to punish him for submitting photographs of Hance's Municipal Code violations to city authorities, assisting in the City's investigation during the initial stages of prosecution, and speaking out at city council meetings. The trial court denied Gregory's motion on the first day of trial, pointing out to him that the purpose of such a motion was to save the time and expense of litigation, and that it was misplaced for purposes of the expedited proceedings under section 527.6.[13]

Gregory contends the court erred in denying his motion without engaging in the required two-step analysis applicable to motions under section 425.16. Among other things, he maintains his photograph taking was protected by the litigation privilege, and also constitutes activities directly related to official and quasi-judicial proceedings, namely, the Smith's administrative complaints, meetings, telephone calls and council appearances concerning Hance's asserted Municipal Code violations. Hance responds

---

13 The court explained the purposes behind section 425.16, and then stated: "[I]n this particular case the purpose of the S.L.A.P.P. suit motion to strike is to save the defendant from the time and cost of litigation. So it gives you a look at the lawsuit 12 months before the actual trial. [¶] In your particular case, today's your trial. [¶] . . . [¶] . . . But the purpose of the motion to strike is not applicable here. The defenses you raise in that, the activities, constitutional activities that can't be restrained, those you have to present to me today. But the motion to strike is misplaced on these type of proceedings. [¶] These type of proceedings by statute are quick and relatively inexpensive. So although your S.L.A.P.P. suit motion may be applicable for a large suit that might be tried in a year, year and a half, they're not applicable to this statute. This statute contemplates quick trial. So based on those comments your motion is denied. [¶] Of course, you will be allowed to raise the defense, as you raised in your motions, that these photographing activities are constitutionally effective, so you will not be denied the ability to present that defense. But the motion to strike the complaint itself is denied."

that Gregory's motion was both procedurally and substantively defective. As for procedural flaws, Hance argues that the paper – labeled a points and authorities – was not accompanied by any "motion"; it was not timely served or noticed; and not brought within the time frame required by section 425.16. As for the substance of Gregory's motion, Hance argues his cross-request for an injunction was not brought primarily to chill a valid exercise of any constitutional right, but rather to put an end to the Smiths' stalking and harassment.

While we may disagree with the trial court's reasoning on the issue, this "would not compel us to find that the court's ruling was error: it is axiomatic that we review the trial court's result, not its rationale." (*People v. Campbell* (1994) 23 Cal.App.4th 1488, 1494; see also *Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 110; *California Aviation, Inc. v. Leeds* (1991) 233 Cal.App.3d 724, 731.) "[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason." (*Davey v. Southern Pac. Co*. (1897) 116 Cal. 325, 329.) Here, we conclude Gregory's purported motion fails on procedural grounds.

As Hance pointed out in opposition to Gregory's filing, Gregory's points and authorities were not accompanied by a proper notice of motion setting forth a hearing date with at least 16-court-days notice. (§§ 425.16, subd. (f);[14] 435, subd. (b); 1005,

---

14 At the time of the hearing on Gregory's purported motion, section 425.16, subdivision (f) provided: "The special motion [under section 425.16] may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing." Effective

subd. (b); 1010.) That defect by itself warrants rejection of Gregory's filing, for proper notice serves not only statutory requirements, but fundamental principals of due process. (See *Jones v. Otero* (1984) 156 Cal.App.3d 754, 757.) The court would have erred in considering the motion on its merits under the circumstances. (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 6, citing *Rodman v. Superior Court* (1939) 13 Cal.2d 262, 269 ["the law 'seems well settled (and there appears to be no case holding to the contrary) that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and *certiorari* will lie to correct such excess' "].)

## IV. *Attorney Fees on Appeal*

Hance requests an award of attorney fees on appeal under the parties' MOU and Civil Code section 1717, subdivision (a), as well as attorney fees incurred in defending against Gregory's arguments as to his purported motion under Code of Civil Procedure section 425.16. "An appellate court reviews a determination of the legal basis for an award of attorney fees independently as a question of law." (*Leamon v. Krajkiewcz*

---

October 5, 2005, the Legislature amended subdivision (f) of section 425.16 to provide that the clerk of the court would schedule the motion not more than 30 days after service of the motion. (Stats. 2005, c. 535 (A.B. 1158), § 1, eff. Oct. 5, 2005.) We do not address the impact of that amendment on the sufficiency of Gregory's notice in this case.

(2003) 107 Cal.App.4th 424, 431; see also *Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 779-780.)[15]

A. *Attorney Fees on Appeal under Civil Code section 1717*

The Smiths do not oppose Hance's request for an award of attorney fees on appeal under Civil Code section 1717. We conclude Hance is entitled to recover such fees under paragraph five of the MOU, which provides: "Any future violations of this MOU or the Settlement Agreement shall be resolved by a JAMS arbitrator who shall have the jurisdiction to determine the existence or non-existence of the alleged violation, and discretion to award damages. The prevailing party shall be entitled to recovery of his or her reasonable attorney fees and costs."

"California courts liberally construe the term ' " 'on a contract' " ' as used within section 1717. [Citation.] As long as the action 'involve[s]' a contract it is 'on [the] contract' within the meaning of [Civil Code s]ection 1717." (*Dell Merk, Inc. v. Franzia* (2005) 132 Cal.App.4th 443, 455; see also *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598, 605 ["California courts 'liberally construe "on a contract" to extend to any action "[a]s long as an action 'involves' a contract and one of the parties would be entitled to recover attorney fees under the contract if that party prevails in its lawsuit" ' "].) " '[E]ven if breach of contract

---

15 Hance's request does not cite section 527.6, and as we understand his argument, Hance does not seek an award of attorney fees under section 527.6, subdivision (i), which provides that "[t]he prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any."

is not specifically pleaded, an action may be "on a contract" where . . . the contract claim is asserted during trial "and the [contract] theory . . . [is] well known to court and counsel." ' " (*Walsh v. New West Federal Savings & Loan Assn.* (1991) 234 Cal.App.3d 1539, 1547, quoting *Bruckman v. Parliament Escrow Corp.* (1987) 190 Cal.App.3d 1051, 1060.) Here, the MOU had required the parties to execute a settlement agreement providing they "shall comply with all state and local laws, codes, and ordinances."[16] Hance's petition for a civil harassment order against the Smiths sought to put an end to camera surveillance occurring "in violation of the MOU." The proceeding, in effect a " 'highly expedited lawsuit on the issue of harassment,' " (*Thomas v. Quintero*, *supra*, 126 Cal.App.4th at p. 647) sufficiently involved the MOU to permit the recovery of attorney fees under its attorney fee provision.

Gregory was not a signatory to the MOU. That does not, however, prevent an attorney fee award against him. Section 1717 commonly allows recovery of attorney fees in litigation between signatories to a contract containing a fee provision, yet "the reciprocity principles of . . . section 1717 [also] will be applied in actions involving signatory and nonsignatory parties." (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 379-380 (*Real Property Services* ), citing *Reynolds Metal Co.*

---

16 Paragraph 4 of the MOU provides: "The Settlement Agreement to be executed by the parties shall contain mutual non-disparagement/harassment provisions, and shall also contain the following provisions: [¶] (a) All parties shall comply with all state and local laws, codes and ordinances; [¶] (b) The parties shall refrain from trespassing on each other's property; [¶] (c) The Hances and Mullette agree that to the extent they maintain video cameras, the camera angles or line of sight shall extend no further in the direction of the other party's property than the curb line adjoining that property."

*v. Alperson* (1979) 25 Cal.3d 124, 128.) The rule in such circumstances, as summarized by one treatise, is "if a prevailing signator would be entitled to fees against a nonprevailing nonsignator, then nonsignators in litigation on such contracts are both entitled to attorney fees if they prevail and obligated to pay attorney fees if another party prevails." (Attorney Fee Awards (Cont.Ed.Bar 2d ed. 2006) Attorney Fee Awards Based on Contract, §§ 6.10, p. 175.) The prevailing party is entitled to fees from a nonsignatory to the contract "if it can prove it would have been liable for attorney fees had the opponent prevailed." (*M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 Cal.App.4th 456, 467.)

Here, Hance sought an injunction against Gregory in part based upon the MOU, claiming at trial that Gregory acted in concert with Steven and obtaining a finding from the trial court to that effect. Hance also asserts on appeal that Gregory was deemed bound by the MOU. Gregory does not challenge any of these points. We conclude Hance pursued a legal theory holding Gregory to the MOU such that, had Gregory prevailed, Gregory would have been entitled to claim attorney fees under the MOU. (See e.g. *Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 548, fn. 5; *Babcock v. Omansky* (1973) 31 Cal.App.3d 625 [prevailing nonsignatory sued on allegation she was a partner or co-adventurer on the contract; court held she was entitled to fees because she would have been exposed to contractual liability had "co-adventurer" liability been shown], disapproved in *Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 485, but cited with approval in *Reynolds Metals Co. v. Alperson, supra*, 25 Cal.3d at

pp. 128-129.) As a consequence, an award of attorney fees against Gregory is appropriate under Civil Code section 1717.

B. *Attorney Fees on Appeal Against Gregory under Section 425.16*

Section 425.16, subdivision (c) provides "[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court *shall* award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (Italics added.) On January 13, 2006, following entry of its civil harassment order on the matters, the trial court ordered Gregory to pay Danny and Jennifer Hance attorney fees under section 425.16. Gregory has not appealed from that order.

" 'A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise.' " (*Wanland v. Law Offices of Mastagi, Holstedt and Chiurazzi* (2006) 141 Cal.App.4th 15, 21, quoting *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499-1500.) However, an award of attorney fees under section 425.16 is a sanction that must be awarded under section 128.5 (*Moore v. Shaw* (2004) 116 Cal.App.4th 182, 199), and requires a finding that the motion was solely intended to cause unnecessary delay or frivolous. " 'A determination of frivolousness requires a finding the motion is "totally and completely without merit" [citation], that is, ' any reasonable attorney would agree such motion is totally devoid of merit.' " (*Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375, 1388.)

We need not address whether Gregory's motion is totally devoid of merit because we agree, having reviewed Gregory's conduct in seeking to avoid adjudication of the matter (see footnote 3, *ante*) and his failure to provide notice of his motion, the motion was filed with the sole purpose of unnecessarily delaying the matter. Accordingly, Hance is entitled to an award of attorney fees in defending Gregory's appeal under the mandatory provision in section 425.16, subdivision (c). We remand the matter to the trial court for determination of the reasonable and appropriate amount of respondents' attorney fees and costs on appeal under Code of Civil Procedure section 425.16, subdivision (c), as well as under Civil Code section 1717. (*Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 448; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1426.)

DISPOSITION

The order is affirmed and the matter remanded to the trial court for a determination of the proper amount of attorney fees on appeal in accordance with this opinion. In addition to attorney fees, Hance shall recover costs on appeal.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.